U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 22 August 2005

BALCA Case No.: 2004-INA-312
ETA Case No.: P2002-FL-04396744

In the Matter of

CREATIVE HOME & HORTICULTURAL PRODUCTS, INC.,
Employer

on behalf of

PEDRO LOPEZ REYES,
Alien.

Appearance: David A. Baggett, President
c/o Creative Home & Horticultural Products, Inc.
Niceville, Florida[1]
For the Employer

Certifying Officer: Floyd Goodman
Atlanta, Georgia

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Pedro Lopez Reyes ("Alien") filed by Creative Home & Horticultural Products, Inc. ("Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated

[1] Liz Voyles of New World Immigration Services, Inc. appeared on behalf of the Employer and the Alien while the application was pending before the Certifying Officer. The appeal, however, was filed by the Employer, *pro se*.

thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, Atlanta, Georgia, denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26. The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On August 19, 2002, the Employer, Creative Home & Horticultural Products, Inc., filed an application for labor certification to enable the Alien, Pedro Lopez Reyes, to fill the position of "Shop Foreman," which was classified by the Job Service as "Supervisor, Shop." (AF 236). The application was filed with a request for reduction in recruitment ("RIR") processing. (AF 247).

The job duties for the position, as stated on the application, were:

> Responsible for supervising the shop employees; maintain all equipment including the repairs; and handle the shipping of finished products. Must have experience working with multiple Blade 12" Machine Rimini M3 Rip Saw, XL Moldmatcher 2000 Series, Ritter 23 Drill Model 123 Drill Press, Mini Wax Model EE1500 stroke sander. Must have 2 years experience as a Machinist with background in industrial electronics.

(AF 236).

The stated experience requirement was two years in the job offered or in the related occupation of "Machinist." The position would involve supervising two employees and reporting to the Owner. The Employer's initial wage offer for the job opportunity was $400.00 per week. (AF 236). However, the Job Service notified the Employer that the prevailing wage rate for the job opportunity is $960.00 per week. (AF 234-235). Accordingly, on October 30, 2002, the Employer amended the application and raised its wage offer to $960 per week. (AF 241).

In a Notice of Findings ("NOF") issued on February 1, 2004, the CO proposed to deny certification on the grounds that the Employer had not established that it had enough funds available to pay the wage or salary offered and/or to show that the job opportunity is clearly open to U.S. applicants. (AF 8-9).[2] On February 11, 2004, the Employer submitted its rebuttal. (AF 116-218). The CO found the rebuttal unpersuasive, and issued a Final Determination, dated February 27, 2004, denying certification. (AF 114-115). On or about March 27, 2004, the Employer appealed the Final Determination. (AF 1-113). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals.

DISCUSSION

Pursuant to 20 C.F.R. §656.20(c)(1), an employer must clearly show that it has enough funds available to pay the wage or salary offered the alien. Furthermore, an employer must also show that the job opportunity is clearly open to any qualified U.S. worker. 20 C.F.R. §656.20(c)(8).

In the NOF, the CO stated, in pertinent part:

> Finding(s):
>
> It is not clear whether this job opportunity is clearly open to U.S. applicants because the employer appears to be solely interested in the alien. The employer initially offered a salary of $400.00 per week, but changed it when the State Employment Security Agency (SESA) indicated that the prevailing wage is $960.00 per week. The employer has raised the salary $560.00 per week. This job does not appear to be open to U.S. applicants if the employer is wiling to more than double the salary in order to continue processing this case.
>
> In addition, because the employer's initial wage offer was substantially lower than the prevailing wage, the employer must show that they have sufficient funds to pay the prevailing wage rate.

[2] The NOF, dated February 1, 2004, was misaddressed. (AF 8). Accordingly, the CO issued another NOF on February 17, 2004. (AF 219-220). However, in the interim, Employer received the NOF, dated February 1, 2004, and responded thereto. (AF 116).

Corrective Action Required:

The employer must prove that this job is clearly open to U.S. applicants and that the employer is not solely interested in the alien. The employer must submit the following documents:

1. Tax returns for the last years.

2. Payroll records for all employees in the company, and their titles.

(AF 9).

The Employer's rebuttal consists of a cover letter, dated February 11, 2004 (AF 116), an explanatory statement by the Employer as to why it increased its wage offer (AF 117-119), photographs of the Employer's products and machinery (AF 120-127), the Employer's Federal Tax Returns for 2000, 2001, and 2002 (AF 128-170), and the employee payroll records for the same three-year period. (AF 171-218).

Although the Employer's rebuttal included extensive documentation, its explanatory statement regarding its increased wage offer simply *confirms* the CO's suspicions that the Employer does not have sufficient funds to pay the prevailing wage rate, and that the job opportunity is not open to U.S. workers. (AF 117-119). The Employer's President & Owner, David A. Baggett, stated, in pertinent part:

> When I filed my original application I used the work [sic] supervisor in the job title and job description. I did not intend to do that. I am, and will remain, the only supervisor - - remember this is a small company. The Florida Dept. of labor informed us that with a supervisor title the prevailing wage would have to be $960.00 per week and I was only offering $400.00 per week. At that point as I understood it, I had two choices: (1) Redo the paper work without the title of supervisor, which is not correct, or (2) change the offering of $400.00 per week to $960.00 per week. I elected number two, thinking that if I could get this man here quick enough I could start reuseing (sic) the equipment, pick up sales and with some additional investment I could pay the $960.00 per week.

> As you can see time has passed and I have not been able to get the proper paper work completed and have the man here. You can look at my Tax returns and see it would be impossible to pay that kind of salary at this time and I do not want to invest that much more money into the company to carry the man until I build the company back up.

(AF 118).

Citing the Employer's own rebuttal statement, the CO issued a Final Determination, dated February 27, 2004, denying certification. Furthermore, the CO suggested that if the Employer still wanted to hire the Alien for a different position, it should re-file a new application. (AF 115). We agree.

Upon review, we find that the Employer's rebuttal establishes that it is only interested in hiring "this man" (*i.e.,* the Alien), and that, in order to do so, it has misused the labor certification process. By the Employer's own admission, the position of "Shop Foreman" and supervisory duties set forth in the Application for Alien Employment Certification do not exist. Moreover, instead of correcting these "errors," the Employer compounded the problem by more than doubling its salary offer, even though the Employer acknowledged it does not have sufficient funds to pay the higher wage offer.

Finally, we note that the Employer resubmitted the same documentary evidence previously filed on rebuttal with its Request for Review. However, in the cover letter, dated March 27, 2004, Employer's President provided a basis for the request for review, which directly contradicts his own prior statement. In the request for review, Mr. Baggett stated, in pertinent part, that Employer maintains the financial ability to pay the proffered wage of $960.00 per week. (AF 1-2; *Compare* AF 118). Since this new statement was not before the CO, it is not properly before us. *See* 20 C.F.R §656.24(b)(4); *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*); *Fried Rice King Chinese Restaurant*, 1987-INA-518 (Feb. 7, 1989)(*en banc*). Moreover, assuming *arguendo* that we would consider Mr. Baggett's statement, dated March 27, 2004, we would accord it no weight in light of his prior conflicting statement and other actions in this matter.

This case was before the CO in the posture of an RIR request. In *Compaq Computer Corp*., 2002-INA-249-253, 261 (Sept. 3, 2003), this panel held that where the CO denies a request for reduction in recruitment, the proper procedure is to remand the case to the State Workforce Agency ("SWA") for regular labor certification processing. Subsequently, however, we held in *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004), that "[a]n employer who is not able to establish that it can offer a *bona fide* job opportunity has presented an application that is so fundamentally flawed that it would serve no purpose to remand the case for regular processing. In such a case, the CO may deny the application outright rather than remand for regular processing, even if the case was presented in a RIR posture." *Compare Marcello's Ristorante*, 2003-INA-228 (Feb. 10, 2005) (CO's finding of lack of *bona fide* job opportunity was insufficiently supported to deny remand for supervised recruitment).

In the instant case, the Employer's application does not support a finding that there is a *bona fide* job opportunity or sufficiency of funds to pay a worker to fill the position applied for -- shop foreman. The only way to remedy this deficiency in the application would be to advertise a different job. Such a change fundamentally alters the application and requires the submission of a new application. Accordingly, a remand in this case is not warranted.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.